(2)

89-1716



No. _____

In The

# Supreme Court of the United States

October Term, 1989

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PUEBLO OF SANTO DOMINGO,

*Petitioner,*

v.

ARNOLD J. RAEL, SOPHIA V. RAEL, SERAFIN RAEL, LIONEL E. RAEL, JOSE IVAN RAEL, HENRY C. RAEL, and JERRY C. RAEL,

*Respondents.*

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

I. The United States Is An Indespensable Party To This Action.

II. The Pueblo Of Santo Domingo's Motion For Summary Judgment Was Properly Denied Because Issues Of Material Facts Exist.

III. The Lower Court Lacks Jurisdiction Over This Action.

A. Extinguishment Of The Pueblo of Santo Domingo's Have Occurred.

B. The Defense Of Abandoment Applies.

C. Collateral Estoppel And Judicial Estoppel Applies.

D. The Doctrine of Election Of Remedies Applies.

E. Various Acts Of Congress Have Divested This Court Of Jurisdiction To Hear This Action.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES — Continued

TABLE OF AUTHORITIES — Continued

Page

TABLE OF AUTHORITIES — Continued

TABLE OF AUTHORITIES — Continued

Page

## STATEMENT OF THE CASE

The Respondents (hereinafter referred to as the "Raels") are the owners of three tracts of land (referred to as "Rael Tracts 1, 2, and 3"), encompassing approximately 1280 acres of land, located roughly between Los Alamos, Albuquerque and Santa Fe, New Mexico. The tracts had originally been acquired by the Raels, or their predecessors in title, from the United States Government under the Homestead Laws during the middle and late 1930's, with the United States reserving the rights of way to ditches and canals constructed by the authority of the United States, and reserving to the United States "all coal and other minerals in the lands." The Petitioner, the Pueblo of Santo Domingo, is an Indian pueblo whose lands are East of the three Rael tracts.

On December 21, 1983, the Pueblo filed its "Complaint to Quiet Title" against the Raels to quiet title to the Real tracts in the name of the Pueblo on the basis of two land claims: first, that said tracts were apart of the aboriginal lands of the Pueblo; and second, that the Pueblo had purchased the alleged "Diego Gallegos" Spanish land grant in 1748 for "400 pesos" from "Maria Josefa Gutierrez," which claim was alleged to include the Rael tracts. The complaint also sought damages for trespass in the "Third Claim," and for damages for unauthorized grazing of livestock under 25 U.S.C. section 179.

Raels denied the allegations of the complaint, and counter-claimed against the Pueblo for slander of title. The counterclaim was dismissed by the lower court on June 6, 1984, upon the motion of the Pueblo, on the basis of the Pueblo's "sovereign immunity."

Upon the motion of the Pueblo, the lower court struck the affirmative defenses of laches, estoppel, limitations of action and adverse possession listed in the Rael's "Answer," and granted the Pueblo judgment on the pleading concerning the Rael's affirmative defense I, alleging lack of subject matter jurisdiction; defense IV, that the complaint failed to state a cause of action for which relief can be granted; defense V, that indispensable parties to the suit existed (the Rael tracts contained less than 5% of the total land claimed by the Pueblo to be in the boundaries of the alleged Gallegos land grant; the remaining land is titled in the names of other private land owners, the State of New Mexico, the U.S. Forest Service, the Bureau of Land Management, the Pueblos of

San Felipe, Cochiti and Jemez, and the Pueblo of Santo Domingo, itself); defense VII, that the Gallego's grant claim was barred by the provisions of the act establishing the Court of Private Land Claims, 26 Stat. (1891); and defense IX, alleging that the Pueblo of Santo Domingo had "confirmed and acknowledged" the Raels titles for decades, and had even passed a formal Tribal Resolution to purchase two of the three tracts for $587,000, immediately prior to the filing of the suit. (Doc. No. 33, "Memorandum Opinion and Order," filed 8/20/84, Petitioner's App. 37-40).

On December 7, 1984, the lower court granted a Rael motion to include in their Answer the affirmative defenses of "Abandonment" and 'Extinguishment."

On December 28, 1984, the Pueblo moved to dismiss without prejudice their two claims for damages for trespass and unauthorized grazing, which was granted on February 12, 1985. (On December 28, 1984, the Pueblo moved to strike the jury demand made by the Raels, since the action was to quiet title for which a jury trial was not allowed. The Raels responded that they had continuous, uninterrupted possession of the Rael tracts from the 1930's, that their present possession of said tracts made the action one in ejectment, for which a jury trial was allowed. The lower court held an evidentiary hearing on the factual issue of possession on July 8, 1985. On July 10, 1985, the lower court found the Raels to be in titled possession of the Rael tracts, making the claim of the Pueblo to be one in ejectment, for which a jury trial was available. (Doc. No. 91, "Memorandum Opinion and Order" filed 7/10/85, Petitioner's App. 28-36).

On February 6, 1985, the Raels filed a motion to dismiss based on the defenses of abandonment, extinguishment, lack of jurisdiction based on the provisions of the Indian Claims Commissions Act, 60 Stat. 1049 (1946), codified at 25 U.S.C. section 70 *et seq* (1976); and that the United States was an indispensable party to the action. The motion to dismiss was denied by the lower court on July 10, 1985. (Doc. No. 91, "Memorandum Opinion and Order" filed 7/10/85, Petitioner App. 2536).

On October 18, 1985, the lower court granted the Raels' motion to include in their answer the affirmative defense of "Election of Remedies." On October 22, 1985, the lower court denied the Raels' second motion to dismiss on the grounds that the

action was for ejectment, while the complaint was for quiet title.

On September 27, 1985, the Raels filed a third motion to dismiss and/or for Summary Judgment, which was denied on May 16, 1986. (Doc. No. 137, "Memorandum Opinion and Order" filed 5/16/86, Petitioner App. 16-27).

On October 11, 1985, the Pueblo filed a motion for summary judgment on its claim based on the purchase of the alleged Gallegos land grant in 1748. On May 5, 1986, the lower court partially granted the Pueblo's motion for summary judgment, ruling that the Gallegos land grant was a legal Spanish land grant made in 1730; that the Pueblo did purchase the grant from the widow of Diego Gallegos in 1748, which purchase was recognized by the Spanish officials, and the Pueblo of Santo Domingo neither sold nor divested the grant prior to the Treaty of Guadalupe Hidalgo in 1848; that the Pueblo had not been divested of the grant by abandonment or extinguishment, and had not lost its claim by any other actions or inactions of the Pueblo; and that the Gallegos grant claim is superior to the homestead patents received by the Raels, or their predecessors in title, from the United States Government. The lower court ruled that the sole issue for a trial on the merits was the location of the boundaries of the Gallegos grant, and those factual issues concerning the Pueblo's aboriginal use claim. The lower court further ruled that the defense of extinguishment was not available to the Raels, and that the defense of abandonment could only apply to the aboriginal use claim, and not concerning the Gallegos grant claim. (Doc. No. 137, "Memorandum Opinion and Order' filed 5/16/86, Petitioner's App. 16-27).

The cause came on for trial on the merits before a jury on August 5, 1986. After the first day of trial, the lower court requested counsel for the Pueblo to move for a bifurcation of the two claims based on aboriginal use, and the Gallegos grant claim. Over objection by the Raels, the lower court ruled that the trial would only involve the Gallegos grant claim, and that the sole issue of fact for the jury was whether the Rael tracts were within the boundaries of the Gallegos land grant.

At the close of the evidence , the lower court instructed the jury that the Pueblo had made a prima facie case concerning the location of the boundaries of the Gallegos grant and that the Rael tracts were within those boundaries; then he instructed the jury that the burden

of proof concerning those boundaries had shifted to the Raels, who had to prove that the Rael tracts were not within the location of the boundaries of the Gallegos grant which the lower court had already ruled the Pueblo had proved by prima facie evidence. (Doc. No. 160, "Court's Instruction to Jury" filed 8/8/86, Petitioner App. 44-47). After the four day trial, the jury returned a verdict for the Pueblo of Santo Domingo. (Doc. No. 162, Verdict filed 8/8/86, Petitioner's App. 43).

## I. THE UNITED STATES IS AN INDESPENSIBLE PARTY TO THIS ACTION.

The lower court denied the motion to dismiss the complaint for failure to join indispensable parties stating only that:

> "In the case at bar the United States is not an indispensable party. Plaintiff is not seeking to cancel or challenge the validity of the patents issued to the defendants by the United States government. Plaintiff is asserting that it has prior and therefore better title than defendants. Plaintiff's claim does not depend on invalidating an action of the federal government." (Doc. No. 91, Memorandum Opinion and Order" filed 7/10/85, Petitioner's App. 36)

Rule 19 of the Federal Rules of Civil Procedure states in part:

> "A person... shall be joined as a party to an action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and his so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede is ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest."

In *Oglala Sioux Tribe v. United States*, 650 F2d. 140 (8th Cir. 1981), cert. denied 455 U.S. 907 (1982), in a situation very similar to the instant case, the court ruled the United States was immune from suit, and was an indispensable party to the action, requiring the dismissal of the action against the remaining land owners.

The patents received by the Raels from the U.S. government under the Homestead Act in the 1930's specifically reserved to the

United States rights of way to ditches and canals constructed by the authority of the United States, and "all coal and other minerals in the lands." The United States clearly has a direct propriety interest in the Raels tracts. The Raels' predecessor in interest to these lands is the United States. There is a possible argument that the Raels have an action for damages against the United States if the issued patents are ultimately held to have no legal effect, since the Raels have lived on, and have worked, the lands and made improvements on them for over 50 years. The Pueblo from the date of the homestead patents to the filing of this litigation always recognized the Raels possession and ownership of the Rael tracts.

The title to Indian lands is in the United States as trustee, with the Pueblo have only a possessory interest. The United States would have an interest in this cause for that reason alone, and should have been made a party to the action. *United States v. Candelaria*, 271 U.S. 432 (1925); *United States v. Chavez*, 290 U.S. 357 (1933); *State of New Mexico v. Aadomodt*, 537 F.2d 1102 (10th Cir. 1976).

The patents received by the Raels should not be susceptible to attack unless the United States is a party defendant. As this "It is a fundamental principal of the law that an instrument may not be cancelled by a Court unless the parties to the instrument are before the Court." *Tewa Tesuque v. Norton*, 360 F. Supp. 452 (D.N.M. 1973), aff'd 498 F.2d 240 (10th Cir. 1974); see also, *Emhart Corp. v. McLarty*, 226 Ga. 621, 176 S.E. 2d. 698 (1970).

A U.S. patent is protected from third party attack. *Kale v. United States*, 489 F.2d 449 (9th. Cir. 1973); see also *Hoffnagle v. Anderson*, 20 U.S. (7 Wheat.) 212 (1822). "As a matter of federal law, it is well established that the validity of a deed or patent from the federal government may not be questioned in a suit brought by a third party against the grantee or patentee." *St. Louis Smelting and Refining Co. v. Kemp*, 104 U.S. 636, at 647 (1887); *Van Wyk v. Knevals*, 106 U.S. 360, 369 (1882); *Raypath, Inc. v. City of Anchorage*, 544 F. 2d 1019, 1021 (9th Cir. 1976). The Raels should not have to bear the burden of defending actions that should have been brought against the United States. *Stewart v. United States*, 242 F.2d 49 (5th Cir. 1957).

The United States government presently owns most of the land within the alleged boundaries of the Gallegos Grant, maintained either by the Bureau of Land Management, or the U.S. Forest

Service; the State of New Mexico owns several school sections, and even the Pueblos of Cochiti, Jemez, San Felipe, and Santa Ana own tracts of land within the alleged boundaries of the 49,00 acres claimed to be the Gallegos Grant; there are also other private property owners of tracts. The Rael have held grazing leases on approximately 4000 acres of land immediately west of the Rael tracts since the dates of the original patents in 1938. None of these other property owners were included as defendants in the Pueblo's efforts to establish the Gallegos Grant and its boundaries, even though their interests shall be affected by the instant case. The Rael grazing leases were also not included in the Pueblo complaint to quiet title. The Pueblos of Cochiti and Jemez also claim to have had aboriginal possession of the land surrounding the Rael tract.

The United States was an indispensable party based on its actual ownership of the mineral rights to the Rael tracts. Since the effect of the lower court's ruling is that the United States government never owned the Gallegos Grant, the retained mineral rights would be lost. However, the United States also had other interests in the outcome of this litigation than those mentioned. The Pueblo of Santo Domingo filed a claim for damages against the United States in the Indian Claims Commission alleging that it was entitled to damages for the wrongful taking of their lands, and the Rael Tracts are contained within the boundaries of the land allegedly wrongfully taken by the United States. *See generally, Pueblo of San Ildefonso, et. al. v. United States*, 30 Ind. Cl. Com. 234 (1973). The Pueblo's claims for damages never mentions the Gallegos Grant, yet the commission was organized to handle any and all claims which the Pueblo might have. See 25 U.S.C. Section 70a. In that I.C.C. case, the United States and the Pueblo of Santo Domingo stipulated that there had been an extinguishment of the lands claimed for damages, which again included the Rael tracts. *Supra* at 259-271.

The commission entered an "Interlocutory Order" giving effect to the stipulation of extinguishment, and made a ruling on the valuation date to be used. The United States filed an interlocutory appeal of the valuation issue, but the Pueblo of Santo Domingo did not file an appeal of any of the Commission's factual findings or/and legal conclusions. *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (1975). The Pueblo of Santo Domingo, years after

time limits for appeal had run filed motions and objections with the Court of Claims (which inherited the unfinished work of the Indian Claims Commission in 1978, see 25 U.S.C. Section 70r [1976]), that requested the Court to allow it to withdraw from the stipulation which the Pueblo and the United States made before the Commission, alleging unauthorized acts by its previous attorneys.

In a divided opinion, the Court held "that it is far too late in the day to make a motion of this nature." *Pueblo of Santo Domingo v. United States*, 227 Ct Cl. 256, 266, 647 F.2d 1087, 1088 (1981), cert denied, 456 U.S. 1006 (1981). As it now stands, there exists a final, non-appealable judgment that the Pueblo of Santo Domingo is to receive money damages for the loss of the Rael tracts and the surrounding lands due to extinguishment by the United States government of any and all claims to the area which the Pueblo may have had.

At the same time the instant case was before Judge Bratton, another case was pending before a different District Court for the District of New Mexico involving the Navajo Tribe, with factual and legal issues very similar to the instant cause. In a diametrically opposite result to Judge Bratton's ruling, the lower court held that the Navajo Tribe could not pursue an ejectment action against private property owners concerning loss of lands which were within the jurisdiction of the Indian Claims Commission, in absence of the United States as grantor of the patents through which those defendants derive title, since complete relief cannot be afforded the remaining parties. In *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455 (10 Cir. 1987), the Tenth Circuit affirmed the lower court's decision after reviewing the four factors listed in Rule 19(b), stating that:

> "(1) that the claims against the non-federal parties rested on documents of title or possession derived from the United States; (2) that the Tribe seeks to cancel all such instruments; (3) that this Court has affirmed the principle that all parties to an instrument must be present, else it may not be cancelled; (4) that more specifically, validity of a deed or patent issued by the Federal Government cannot be questioned in suit by a third party against the grantee, and (5) that the Eighth Circuit has found indispensability in analogous circumstances." *Supra.* at 1472.

The Court recognized in *Navajo Tribe* that any judgment without participation of the United States would clearly prejudice the interests of the United States, and that this prejudice of interests could not be avoided by protective provisions in the judgment or through the shaping of relief.

## II. THE PUEBLO OF SANTO DOMINGO'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED BECAUSE ISSUES OF MATERIAL FACTS EXIST.

On May 5, 1986, the lower court partially granted the Pueblo's motion for summary judgment, ruling that the Gallegos Grant was a legal Spanish land grant made in 1730; that the Pueblo did purchase the grant from the widow of Diego Gallegos in 1748, which purchase was recognized by the Spanish officials; and the Pueblo neither sold nor divested the grant prior to the Treaty of Guadalupe Hidalgo; that the Pueblo had not been divested of the grant by abandonment or extinguishment, and had not lost its claim by any other actions or inactions of the Pueblo; and that the Gallegos Grant claim is superior to the homestead patents received by the Raels, or their predecessors in title. Concerning the Gallegos Grant claim, the lower court ruled that the sole issue of fact to be tried to a jury was the location of the boundaries of the Gallegos Grant. (Doc. No. 137, "Memorandum Opinion and Order" filed 5/16/86, Petitioner's App. 16-27).

In its response to the Pueblo's motion for summary judgment, the Raels listed what they considered to be questions of fact:

1. The original grant papers are lost and unavailable; the Pueblo relies on a purported copy of the grant, made by one Ulibarri on November 10, 1745 (the grant was made in 1730) The Pueblo's historical expert, Myra Ellen Jenkins, indicates that the Ulibarri copy "transposed the western boundary description with that on the eastern boundary." A second copy of the Ulibarri copy was made on December 14, 1791, by one Armenta, which made a correction of the Ulibarri "mistake" of the eastwest boundary description. (Doc. No. 104. Ex. 2, Jenkin's Report, Petitioner's App. 60)

2. Diego Gallegos sold a tract of land to Miguel de las Vega y Coca on December 16, 1730, for one hundred pesos described as one half of a grant he received west of the Pueblo of Santo

Domingo. (Affidavit of John O. Baxter, Respondent's App. 2-4). The Raels contended this could only be the Gallegos grant which he received less than one year before, since that was the only grant Gallegos allegedly received in the area.

3. No evidence was introduced by the Pueblo when Diego Gallegos actually died. Jenkins did not have original documentation of Diego Gallegos's alleged marriage to Josefa Maria Gutierrez, who purported by made the conveyance to the Pueblo in 1748 as Gallegos' widow.

4. There are many question whether Gallegos complied with many requirements of Spanish law concerning issuance of a Spanish land grant. Jenkins admits that the "Recopilacion de las Reynos de las Indias" and other Spanish legal codes applied to New Mexico during the 1700's. The Recopilacion at the time of making the Gallegos grant required confirmation by the Spanish King. A requirement existed that a land grantee had to live on the land for four years, after which the *alcalde* of that area was supposed to submit a report testifying that the condition of continuous possession had been met and final title papers would be issued. Jenkins acknowledged that Diego Gallegos seems not to have actually lived on his grant, but he continued to try to acquire other land in the Keres region. Many of the various requirements of Spanish law concerning issuance of grants were never followed by any of the Spanish grants in New Mexico, and none can be considered as "perfect" title. (Jenkins Dep at 48-52, Respondent's App 5-11). Also, the descent laws of Spain at the time the Gallegos grant are involved concerning his alleged widow's sale of the grant to the Pueblo, since they had several children. These questions the Raels argued would necessitate an investigation by a historical Spanish legal expert, which Jenkins admits she was not. (Jenkins Dep at 48, Respondent's App 7).

5. The Raels contended that the defenses of abandonment and extinguishment applied to the Gallegos grant claim, which the lower court refused to consider in its ruling on the motion for summary judgment.

6. The Spanish land grants to the various sixteen Pueblos in New Mexico, which were confirmed by the United States through the office of Surveyor General from 1848 to 1860, were normally one square league, while the Pueblo of Santo Domingo received an

area in excess of one square league which generally comports with one half of the area claimed by the Pueblo to be the Gallegos grant. (Baxter Affidavit, Appendix B, Respondent's App 1-3). He states that the Gallegos conveyance to Vega y Coca in 1730 was also a record with the Office of the Surveyor General when it considered the Pueblo's application containing the Gallegos grant. Since the only reason given by Earl Ortiz, the Pueblo's surveyor, for this excess land, which amounts to approximately 25,000 acres, was that it was a surveying mistake, Baxter gave his opinion that the Gallegos Grant claim was considered by the Office of Surveyor General when the Pueblo's lands were surveyed, and that they were given the equivalent of one half of the Gallegos grant, which is all the widow could have conveyed to the Pueblo given the Vega y Coca deed. He stated that "In my opinion, the Pueblo of Santo Domingo's claim to the Gallegos grant has already been acted upon favorably by the Office of Surveyor General and Congress." *Supra* at Respondent's App. 3.

The Raels submit that these factual contentions were well supported in the evidence, and created issues of material fact concerning the validity of the Pueblo's claim to the Gallegos grant, and that therefore, the lower court's ruling granting partial summary judgment was properly reversed by the 10th Circuit Court of Appeals.

## III. THE LOWER COURT LACKS JURISDICTION OVER THIS ACTION

### A. *Extinguishment*

The Raels submit that any and all land claims, no matter what their nature and source, of the Pueblo of Santo Domingo to the Rael tracts have been extinguished by the United States. Though the Pueblo has contested that an extinguishment has occurred, there has been a final determination concerning the extinguishment of the Pueblos's claim to this area, whether based on aboriginal possession or the alleged purchase of the alleged Gallegos Grant.

The judicial determination of all issues of extinguishment of claims of the Pueblo resulted from the special court established for the specific purpose of determining the extinguishment issue and the right of compensability from the United States government for loss of property rights. In 1946, Congress established the Indian

Claims Commission to hear and resolve Indian claims against the federal government. *See generally,* Act of August 13, 1946, Ch. 958, 60 Stat. 1049 (codified as amended at 25 U.S.C. Sections 70(a) to 70(v-3). For over a decade, Congress pondered proposals for alleviating the problem of judicial unavailability to resolve longstanding Indian claims, finally producing the Commission:

> "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive Orders of the President; (2) all other claims in law or equity including those sounding in tort, with respect to which the claimant would have been entitled to sue in a Court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a Court of equity; (4) claims arising from the taking by the United States, whether as a result of treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." 25 U.S.C. 70(a).

The Commission was authorized to handle those tribal claims filed before August 13, 1951, that had accrued prior to enactment of the statute. 25 U.S.C. Section 70(k). Since both the Pueblo's aboriginal possession claim and the Gallegos grant claim accrued prior to 1946, and the language of Section 70(a) clearly encompasses both types of claims, the commission had full jurisdiction over them. The Pueblo was informed of the provisions of the legislation; an Investigative Division was responsible for making a "complete and through search for all evidence affecting each claim," 25 U.S.C. Section 70L(b); and a revolving fund was established for loans to pay expert witnesses. 25 U.S.C. Sections 70N(1-7). The Pueblo admitted that in 1937 they had turned over the original

Gallegos Grant papers to the Bureau of Indian Affairs for translation, and the Translation Bureau of the State Department made translations. During the time the Raels were completing their requirements to obtain homestead patents, the Pueblo was fully aware of the proported Gallegos Grant, yet made no protest to the Rael applications.

The Congressional purpose in enacting the Indian Claims Commission Act was to provide an exclusive and final remedy for Indian tribal claims based upon the deprivation of title, whatever its source, or the possession of lands, which accrued prior to 1946. *Oglala Sioux Tribe v. United States*, 650 F.2d 140, 143 (9th Cir. 1981), cert. denied 455 U.S. 907 (1982).

In *Pueblo of San Ildefonso et. al v. United States*, 30 Ind. Cl. Comm. 234 (1973), the reported decision over the Pueblo's claims before the commission, the Court stated:

> "Each plaintiff formerly enjoyed use and occupancy under aboriginal title to a larger area including but extending well beyond its present land holdings. Parts of these larger areas were granted to third parties by the Spanish or Mexican governments. Other parts were taken from the Plaintiffs by the United States. It is these latter parts which we are concerned with here." *Supra.* at 235.

Since the Raels received patents from the United States, the lands herein of concern were clearly within the jurisdiction of the commission. The Pueblo hired counsel to represent it before the Commission, Darwin P. Kingsley, Jr. of New York City. The Pueblo, with assistance of counsel, free experts, the Bureau of Indian Affairs and the Commission itself, described the areas for which it wanted compensation based on any claims, and there appears in the reported decision to be no factual controversy as to the size of the Pueblo's land claims.

The United States and the Pueblo *stipulated* that the United States was liable for uncompensated extinguishment of these land claims, which included a stipulation that an extinguishment had occurred. *Supra.* at 235-6. The Pueblo and the United States stipulated that three methods were used in the taking of these lands: (1) conveyances under public land laws to various grantees at different times; (2) inclusion in the Jemez Forest Reserve; and (3) inclusion in the New Mexico Grazing District No. 1 created under

the Taylor Grazing Act. Santo Domingo contended that the date of taking regarding extinguishment was 1905 for the Jemez Forest Reserve; 1941 for the Taylor Grazing District; and the date of conveyance of lands patented under public land laws. The United States argued that the date of taking was 1858 by Act of Congress confirming Report of the Surveyor General of New Mexico on the validity of Santo Domingo's claims before that office (which included a claim based on the Gallegos Grant), or 1905, since by that time entries and claims of rights by nonIndians under public land laws within the claimed area had become so numerous. Supra at 237. The only issue was the date of valuation, since the extinguishment was agreed upon. The stipulations between the United States and the Pueblo were included in the reported decision. *Supra.* at 259-71. The commissions' "Interlocutory Order" concerning Santo Domingo's case stated in part:

> "1. The Plaintiff has the right and capacity to assert its claim herein.
>
> 2. At the time American sovereignty attached to New Mexico, pursuant to the Treaty of Guadalupe Hidalgo, 9 Stat. 922, the Plaintiff had aboriginal title to the tract of land described under its name in the commission's finding fact '2.'
>
> 3. The United States, without payment of any compensation, on various dates, extinguished the aboriginal title to various parcels within the aforesaid tract by patenting said parcel to third parties. For such parcels the date of taking is date of entry in the case of non-mineral claims and entries.
>
> 4. On October 12, 1905, the United States without payment of any compensation extinguished the aboriginal title of the Plaintiff to the parcels described in the commission's findings of fact '4.'" *Supra.* at 284.

As has previously been indicated, the Pueblo did not appeal any of the factual or legal conclusions of the Commission. See *United States v. Pueblo of San Ildefonso, et. al,* 513 F.2d 1383 (1975). Santo Domingo never contested that an extinguishment had occurred, and the United States Court of Claims held that "Since the commission's findings are supported by substantial evidence, and since its decision is free from errors of law, the interlocutory orders and determinations appealed from must be, and hereby are

affirmed." *Supra.* at 1396.

As previously discussed, the Pueblo attempted to reopen the case and set aside the Stipulations between the United States and the Pueblo over extinguishment, alleging unauthorized acts by its previous attorneys. All motions to reopen the case and set aside any of the final findings of the commission, specifically concerning extinguishment, were denied, and the conclusions of the commission were held final. *Pueblo of Santo Domingo v. United States,* 227 Ct. Cl. 256, 647 F.2d 1087 (1981), cert. denied, 456 U.S. 1006 (1981).

The Pueblo of Santo Domingo is precluded from relitigating the issue of extinguishment and final resolution of all claims to land, including the Gallegos Grant, because that was the exclusive province of the Indian Claims Commission. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971); Parlane Hosiery co. Inc. v. Shore, 439 U.S. 322 (1979); Restatement (Second) of Judgments, Sections 27 and 29 (1982).

Congress has the power to divest Indians of land to which their title has been recognized, subject to its obligation to pay just compensation for such a taking. *United States v. Sioux Nation,* 448 U.S. 371, 410-11 (1980). The Pueblo of Santo Domingo has repeatedly been given the opportunity to have their claim to the Gallegos Grant confirmed. They submitted their Gallegos Grant claim to the Office of Surveyor-General, which was created by Congress in 1854 to ascertain the origin, nature, character and extent of all claims to lands under the laws of Spain and Mexico. Congress confirmed the Pueblo's application, and instructed the Surveyor General to survery the lands for conveyance. Ultimately 74,753.11 acres were surveyed and approved on October 19, 1860.

Congress again sought to clear land claims based on Spanish and Mexican law in New Mexico by creation of the Court of Private Land Claims, 26 Stat. 854 (1891). Again, the Pueblo, represented by counsel, filed an application for approval of the Gallegos Grant.

Any land grant claim not file within two years of the creation of the Court of Private Land Claims was barred. 26 Stat. 854 (1891), Sec. 12. The lower court held that:

> "Persons claiming land under title perfected prior to accession by the United States could obtain court confirmation of their titles. They were not required to do

> so. The validity of titles not adjudicated by the Court of Private Land claims can be litigated elsewhere" (Doc. No. 33, "Memorandum Opinion and Order" filed 8/20/86, Petitioner's App. 39)

The Raels submit that the lower court's decision that the statutory bar in the enabling legislation for the Court of Private Land Claims was not an extinguishment by Congress can only be reached if the Gallegos Grant claim was "complete and perfect" in 1848, and that the Pueblo had failed to make a sufficient showing of a complete and perfect title under Spanish land grant laws. Further, the act creating the Court of Private Land Claims specifically held that:

> "If in any case it shall appear that the lands or any parts thereof decreed to any Claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid..." 26 Stat. 854 (1891), Sec. 14.

The Raels argue that an extinguishment of the Gallegos Grant claim and the Pueblo's aboriginal possession claim occurred by the Act of Congress confirming the Pueblo's petition before the Office of Surveyor General; that the Act of Congress creating the Court of Private Land claims, with its statute of limitations, also extinguished the Pueblo's Gallegos Grant claim; that the patents which the Raels received under the Homestead laws were also an extinguishment of the Pueblo's land claims; that the Act of Congress creating the Indian Claims Commission also was a congressional extinguishment of land claims for which Indian tribes sought compensation from the United States; and finally, that the stipulation of extinguishment in the Pueblo's Indian Claims Commission case was a final judgment of extinguishment according to the terms of the stipulation.

Other sovereign acts of the United States, besides specific acts of Congress, have been ruled to be acts of extinguishment of Indian land claims. See *United States v. Creek Nation*, 295 U.S. 103 (1934); *Confederate Salish and Kootenai Tribes v. United States*, 229 U.S. 476 (1937); *The Tlingit and Aida Indians v. United States*, 147 Ct. cl. 315 (1954); *Pueblo of San Ildefonso v. United States*, 30 Ind. Cl. Com. 234 (1973). For example, the Executive Proclamation of President Theodore Rossevelt dated October 12, 1905,

of the Gallegos grant, ie. whether the Rael tracts were within those boundaries. This ruling in effect removed the defense of the abandonment for the Raels, since the previous ruling of the court disallowed use to the Gallegos Grant claim.

Aboriginal title claims by Indians based solely on allegations that a tribe to some extent used, or occupied, lands in aboriginal status does not alone establish any rights to occupancy, or title. As the Ninth Circuit Court of Appeals in Wakiakum Bank of Chinook Indians v. Bateman, 655 F.2d 176 (9th cir. 1981) stated:

> "Whether or not an aboriginal right exists would be a question of fact to establish continuous exercise of the right ...." *Supra.* at 659.

There is no allegation in the Complaint that the lands of the Raels are contiguous to the Pueblo; or that the Pueblo has ever interfered with the title or possession of the Raels to these tracts. There is no evidence in the record that the Pueblo has continuously occupied, and extensively used, these Rael tracts after the United States became sovereign over New Mexico in 1848.

Unrecognized aboriginal title claims are dependent upon proof of actual, continuous and exclusive possession, and a proof of voluntary abandonment of an area by a tribe constitutes a defense to a land claim. *Williams v. City of Chicago,* 242 U.S. 434 (1917); *Buttz v. Northern Pac. R.R.,* 119 U.S. 55 (1886); *Shore v. Sell Petro. Corp.,* 60 F.2d 1 (10th Cir.), aff'd 55 F2d 696 (D. Kan. 1931), cert. denied, 287 U.S. 656 (1932); *see also, Mashpee Tribe v. New Seabury Corp.,* 592 F. 2d. 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979) (Wherein the Court sustained a jury verdict that a tribe had voluntarily abandoned its tribal status).

Aboriginal title, being only a permissive right of occupancy granted by a sovereign, must be *recognized* by the sovereign, otherwise no claim can judicially cognizable, much less support a claim for compensation. *Tee-Hit-Ton-Indians v. United States,* 348 U.S. 272 (1954); *Northwestern Bands of Shoshone Indians v. United States,* 324 U.S. (1945).

The Pueblo contends that the lands which it received by Act of Congress from the report of the Office of Surveyor General in 1859, 11 Stat. 374 (1859), were only approved on the basis of the Spanish Pueblo land grant given to the Pueblo of Santo Domingo by Governor Cruzate purportedly in 1689. However, the Pueblo

contends that the Cruzate grant was the only basis for the award of almost 75,000 acres of land through the Office of the Surveyor General, approximately 25,000 acres in excess of one square league. Their land claims to the Office of the Surveyor General were based on what lands the tribe had received during the over two hundred year sovereignty under Spain. These claims are not reservations created by Congress, and are not based on concepts of aboriginal status determinations by the United States. Yet the lower court ruled that the defense of abandonment does not apply to claims based on alleged rights created under another sovereignty. This history of Spanish, Mexican and American sovereignty, and the creation of differing land rights under different land laws, is a factor to the determination whether or not the defense of abandonment apply to the Pueblo's Gallegos Grant claim. Though the defense has only typically been used regarding aboriginal claims presented to the United States by an Indian tribe, when those aboriginal possession claims have already been submitted to, and adjudicated by, a prior sovereignty, the abandonment issue takes on another light. The Pueblo abandoned aboriginal possession, claims, and any unresolved issues concerning the Gallegos grant by its acceptance of the survey by the office of Surveyor General in 1860.

The Pueblo argues that the Gallegos Grant was not considered by Congress or the Office of the Surveyor General in 1859, however, it never presented evidence that the Pueblo protested to anyone that the Gallegos Grant claim had not been properly handled. This would be evidence of abandonment. The Pueblo did include the Gallegos Grant claim to the Court of Private Land Claims in its first petition, however, it was withdrawn from its amended petition. This would be evidence of abandonment.

The United States made another effort to "quiet the lands within the Pueblo Indian land grants" by enacting the Pueblo Lands Act of 1924, ch. 331, 43 Stat. 636; *see generally, New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), cert. denied, 429 U.S. 1121 (1977). The Gallegos Grant claim was never raised before the Pueblo Lands Board by the Pueblo of Santo Domingo, but it did receive from Congress compensation in excess of that recommended by the Land's Board. (Act of May 31, 1933, 48 Stat. 108). The Pueblo did not object to Congress, or the President, about infringement with its Gallegos Grant claim when the Santa Fe

National Forest was created, nor when the Taylor Grazing Act was passed. The Pueblo did not protest the homestead patents to the Raels, nor their titled possession on the land for over fifty years. The Pueblo never used the Gallegos Grant claim in its case before the Indian Claims Commission. The Pueblo has been represented by counsel, free experts, federal agencies, and a long series of different legal counsel, yet the first actual presentation of the Pueblo's Gallegos Grant claim to full adjudication was when it decided to back out of their agreed upon purchase of two of the Rael tracts for $578,000, and instead sue only the Raels, not all the other Pueblos, state and federal agencies, and other private landowners within the alleged boundaries of the Gallegos Grant.

Not only is the Pueblo's history of not seeking confirmation of the Gallegos Grant claim from 1848 to the filing of this case evidence of abandonment of the claim, its petition to the Indian Claims Commission for money damages for loss of the Rael Tracts is clearly evidence of abandonment.

## C. COLLATERAL ESTOPPEL AND JUDICIAL ESTOPPEL

Section 70(k) of the Indian Claims Commission Act requires that:

> "The commission shall receive claims for period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted *to any Court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.*" (Emphasis added)

This language of the Indian Claims Commission Act, and other sections thereof, preclude the filing of the present action. *See, Tewa Tesuque v. Morton,* 360 F. Supp. 452 (D.N.M. 1973), aff'd 498 F.2d 240 (10th cir. 1974); *Raypath Inc. v. City of Anchorage,* 544 F.2d 1019 (9th Cir. 1977); *Navajo Tribe v. State of New Mexico,* supra.

Longstanding reliance on Executive acts, and on the effects of Congressional acts, creating thousands of public and private land and water rights, cannot be set aside. *United States v. Texas,* 162 U.S. 1 (1896); *Stone v. United States,* 60 U.S. (2 Wall.) 525 (1865).

The Pueblo of Santo Domingo is also barred under the

principles of judicial estoppel, since a final determination in a non-appealable judgment exists that the Pueblo's claims to the Rael tracts have been extinguished. Judicial estoppel prohibits litigants from mocking final judicial decisions, protecting the integrity of the judicial process. "The doctrine of judicial estoppel precludes a party from advocating a position inconsistent with one previously taken with respect to the same facts in an earlier litigation...." *Himel v. Continental Illinois Nat'l Bank and Trust Co.*, 596 F.2d 205, at 210 (7th Cir. 1979); *United Virginia Bank/Seaboard Nat'l v. B.F. Saul Rael Estate Inv. Trust*, 641 F.2d 185, 188-90 (4th Cir. 1981)

The doctrines of collateral estoppel and re judicata apply to the position that the Pueblo has taken in the instant case. *Donovan v. United States Postal Service*, 530 F. Supp. 894, 902 (D.D.C. 1981). As Judge Friendly stated in *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2nd Cir. 1961), cert. denied, 368 U.S. 986 (1962):

> "Whether a judgment, not final in the sense of 28 U.S.C. Sec. 1291, ought nevertheless be considered 'final' in the sense of precluding litigation on the same issues, turns upon such factors as the nature of the decision (ie. that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. 'Finality' in context here relevant means little more than the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be relitigated again."

*See also, United States ex rel. DiGiangiemo v. Regan*, 528 F.2d 1262, 1265 (2nd cir 1975), cert. denied, 426 U.S. 950, 96 S.Ct. 3172, 49 L.Ed. 2d 1187 (1976); *Dyndul v. Dyndul*, 620 F.2d 409, 411-12 (3rd Cir. 1980); *Miller Brewing Co. v. Schiltz Brewing Co.*, 605 F.2d 990, 991 (7th Cir. 1979); *Pye v. Georgia Dept. of Transportation*, 513 F.2d 290, 292 (5th Cir. 1975); Restatement (Second) Judgments, Section 41.

As the 4th Circuit noted: "[The] judicial process should not be lent to this plain example of intentional self-contradiction ... as a means of obtaining unfair advantage." *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167-8 (4th Cir. 1982).

## D. ELECTION OF REMEDIES

The lower court's reasoning that the defense of election of remedies does not bar the instant case was as follows:

> "It is the defendants' contention that plaintiffs should be precluded from establishing title in this court and then recovering damages for extinguishment in the Court of Claims. Regardless of the merits of defendants' position, the record before this court indicates that defendants' motion is prematurely made. At this time, plaintiff would appear to be making a good faith effort to exclude the Diego Gallegos Grant from the stipulation. If successful, defendants' motion will be moot." (Doc. No. 137, Memorandum Opinion and Order filed 5/16/86, Petitioner's App. 26).

In the case where the Pueblo attempted to reopen the ICC case based on an argument that its counsel made unauthorized acts, a final decision ruled that the stipulation entered between the United States and the Pueblo could not be reopened.

The doctrine of Election of Remedies, Roman in origin, is but an application of the maxims that "he who seeks equity must do equity." *Peters v. Bain*, 133 U.S. 670, 33 L. Ed. 696, 10 S.Ct. 354 (1890). The doctrine has been frequently regarded as an application of the law of estoppel, and has prevented a party in the assertion or prosecution of his rights to maintain inconsistent positions, and where there is by law or by contract a choice between two remedies, which proceed upon opposite and irreconcilable claims or rights, the one must exclude and bar the prosecution of the other. 25 Am. Jur. 2d "Election of Remedies," Section 2, p. 648.

The doctrine has been viewed in terms of estoppel, the law of waiver, *Peterson v. Lott*, 200 Ga. 390, 37 S.E. 2d 358, and as a rule of procedure or judicial administration. *Berger v. State Farm Mut. Ins. Co.*, 291 F. 2d 666 (19th Cir. Kan.).

Various courts have held the doctrine to be objectionable, especially where it can serve as an instrument of injustice and oppression, as where the unsuccessful invocation of a remedy is held to bar the subsequent enforcement of another remedy. *Smith v. Kirkpatrick*, 305 N.Y. 66, 111 N.E. 2d 209, reh. denied, 305 N.Y. 926, 114 N.E. 2d 477.

Such type of criticism is not applicable to the instant case. In fact, double recovery is possible, and unless the court applies the

doctrine to the instant case, the result will amount to an injustice and oppression, not only to the Raels, but the other landowners in a similar situation to the Pueblo. Among the factors the courts have considered include long delay on the part of the litigant in invoking the remedies at his disposal, *United States v. Oregon Lumber Co.*, 260 U.S. 290 (1923); whether double compensation of plaintiff is threatened; whether the defendant has actually been misled by plaintiff's conduct; and whether res judicata can be applied. National Lock Co. v. Hogland 101 F.2d 576 (7th Cir Ill.).

Out of the primary concerns in applying the doctrine to the case at hand is whether the Pueblo has made a decisive choice of one remedy which precludes the availability of a conflicting remedy. As the Raels have previously argued, the Pueblo has made a final decisive election of remedy by allowing a final judgment of extinguishment and entitlement to damage before the Indian Claims Commission to occur.

The application of the doctrine of election of remedies to cases involving claims to real property have been numerous. *See United States v. Oregon Lumber Co.*, supra.; *Hoskins v. Smith*, 133 Wash. 90, 233 P. 279; *Frederickson v. Nye*, 110 Ohio 459, 144 N.E. 299, 35 A.L.R. 1163; *Christmen v. Rinehart*, 46 Idaho 701, 270 P. 1059.

The Raels request this court to hold applicable the doctrine of election of remedies in this cause, since the Pueblo has made a prior, final, conclusive and irrevocable election, and that such constitutes an absolute bar to the present action.

The Indian Claims Commission Act clearly contains language that bars Indian Tribes from litigating matters already adjudicated before the commission. The relevant provision state:

> "The payment of any claim, after its determination in accordance with this act shall be a full discharge of the United States of *all claims and demands touching any of the matters involved in the controversy.*" (Emphasis added) 25 U.S.C. Section 70(u).

The legislative history of the Act clearly shows an intention to create a complete bar to further proceedings arising out of the same subject matter. The House Indian Affairs committee succinctly stated the reason behind the provision: "This is necessary if the Commission is to fulfill its function of winding up *all outstanding Tribal Claims.*" (Emphasis added) R. Barker and A. Ehhreufeld,

Legislative History of the Indian Claims Commission Act of 1946, 148 (1946); *see also*, H.R. Rep. No. 1466, 79th cong., 2nd. Sess., represented in United States Code Cong. and Ad. News 1347; S. Rep. No. 310, 78th Cong. 2d Sess. (1944); H.Rep. No. 291, 78th cong. 2nd Sess. (1944); [1944] Sec. Int. Ann. Rep. 252; S. Rep. No. 1715, 79th cong. 2nd Sess. (1946).

The entire purpose behind the Act was to finally resolve Indian land claims, no matter the type of claim. The Pueblo of Santo Domingo had presented its various claims to the Office of Surveyor General, the Court of Private Land Claims, and the Pueblo Lands Board, over a period of almost a century, and the legislative history of the ICC act clearly indicates that any outstanding land claims against the United States had to be presented to the Commission. The history of the Pueblo's case before the commission shows that the Pueblo itself sought to resolve all its outstanding claims. From the filing of its petition before the Commission in August 1951 to the present date there has been a continuous effort by both the Pueblo and the United States to finally compensate the Pueblo for lands claims it lost throughout its history under United States sovereignty. As previously argued, there has been a final determination of what lands were lost, and the method of valuation of the compensation which it is to receive. However, during the past two decades, the Pueblo has in essence sought to avoid payment simply because the valuation of damages was not sufficient. The Pueblo under its new attorneys had endeavored to avoid the statutory bar in the ICC act by bringing a series of law suits against private land owners whose property is within the areas already dealt with by the Commission, while avoiding the United States as a defendant. This clearly frustrates the legislative purpose behind the act. The inequity of the situation, and the violation of the legislative purpose behind the act, is starkly displayed when the Pueblo sues private property owners whose title derives from the United States, like the Raels. The Raels' patents should afford them the same legal position which the United States would have under these circumstances.

President Franklin D. Roosevelt, when he issued patents to the Raels' predecessors in title under the Homestead Act of May 20, 1862, created the "strongest of presumptions" that he exercised not only his powers, but also those delegated by Congress, and the widest latitude of judicial interpretation should be in favor of the

Raels, and against the Pueblo, who bears the burden of persuasion that the President's acts were not authorized. *Dames and Moore v. Regan*, 453 U.;S. 654 (1981); *see also, United States v. Chemical Foundation*, 272 U.S. 1 (1926); *Denby v. Berry*, 263 U.S. 29 (1923); *Dakota Central Telegraph Co. v. South Dakota*, 250 U.S. 163 (1919).

## CONCLUSION

The Raels respectfully submit that the Petition for Writ of Certiorari be denied, with instructions that the lower court should dismiss this action for lack of jurisdiction.

Respectfully submitted this 2nd day of July 1990.

Chris Lucero, Jr.
Attorney for Respondents
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Albuquerque, New Mexico 87194
(505) 843-6687

## APPENDIX INDEX

## APPENDIX B

(April 23, 1986)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

| | | |
|---|---|---|
| PUEBLO OF SANTO DOMINGO, and the UNITED STATES OF AMERICA ex rel, PUEBLO OF SANTO DOMINGO, Plaintiffs, | ) | |
| v. | ) | No. 83-1888 HB |
| ARNOLD J. RAEL, et al., Defendants. | ) | |

### AFFIDAVIT OF JOHN O. BAXTER

COMES NOW JOHN O. BAXTER, and being duly sworn and under oath, hereby states:

1. That he is an historical expert witness retained by the Defendants for purposes of this litigation, and on October 24, 1985, had his deposition taken by Richard Hughes, counsel of the Plaintiff Pueblo of Santo Domingo.

2. After his deposition was taken, he was instructed by counsel for the defendants to investigate more fully the records and proceedings of the Pueblo of Santo Domingo's case before the Office of Surveyor General, and concerning any historical claims made by other pueblos to the archeological site which has been referred to as L.A. 85, as being an ancestral home.

3. I read R. Benedict, Tales of Cochiti Indians (Original Ed. 1931). Benedict interviewed several elderly Cochiti Indians in the 1920's concerning their oral history. The material contained in this work conflicts with the oral history recently given by several Indians from Santo Domingo to experts hired by the Plaintiff that L.A. 85 was exclusively their Pueblo's ancestral home. Oral histories given to Benedict indicate that the people of Cochiti, Santo

Domingo, San Felipe, Acoma, Laguna, and Sia all lived together at "Shipap," speaking the same language and living as brothers. Trouble forced their separation and the Pueblo of Santo Domingo resettled on the east bank of the Rio Grande at Cactus Village, five miles from present Cochiti. The Pueblo of Cochiti resettled at the old Pueblo of San Miguel, seven or eight miles north of present Cochiti. The people of San Felipe, Laguna, and Acoma followed down the Peralta Canyon toward the West and built the ruined pueblo of Peralta Canyon. This oral history obtained by Benedict indicates that L.A. 85 can be considered the ancestral home of the Cociti, and of the other Keres speaking pueblos.

4. The records concerning the Pueblo of Santo Domingo's case before the Office of Surveyor General clearly indicates that the Pueblo included in their application their claim to the Gallegos Grant. There is noting in the records of the Office of Surveyor General, or in the records of the congressional acts approving the Pueblo of Santo Domingo's application, that their claim to the Gallegos grant was allowed or disallowed.

5. The Spanish grants confirmed by congress to the various Pueblos were normally one square league in size. The grant confirmed by Congress to the Pueblo of Santo Domingo was one square league, and an additional large tract which appears to be almost one half the area the Pueblo of Santo Domingo how claims is the Gallegos Grant.

6. Earl Ortiz, the surveyor working for the Pueblos of Santo Domingo in this litigation, testified that this large area granted to the Pueblo by the Office Surveyor General and Congress, in excess of the normal one square league, was a surveying mistake, since 'that's the only explanation I can come up with, is that somebody fouled up.' See Deposition of Earl Ortiz, p. 49-50.

7. Within one year of Diego Gallegos receiving the grant herein of concern, on December 16, 1730, he conveyed to Miguel de la Vega y Coca for one hundred pesos one half of a tract west of the Pueblo of Santo Domingo, describing the property as "a piece of farming and also uncultivated lands on the other bank of the Rio del Norte which he held by grant which the King, our lord, made to him, and they are between Santo Domingo and Jemez and have the name San Miguel de la Cruz." See SANM, no. 1037. Gallegos had no other grant to convey in this area except the one herein of

concern. This granting document from Gallegos to Miguel de la Vega y Coca was available to the Office of Surveyor General during his deliberation concerning the application of the Pueblo of Santo Domingo, and presumably he was aware of it.

8. Through the records of the Office of Surveyor General and congressional records concerning the Pueblo of Santo Domingo's claim do not explicitly refer to what disposition was made concerning the Pueblo's Gallegos Grant claim, the large area granted to the Pueblo in excess of the standard one square league is too large with dimensions drastically different than one square league to be considered simply a surveying error.

9. In my opinion, the area granted in excess of one square league, clearly comporting to one half of the area now claimed to be the Gallegos Grant, indicates that the office of Surveyor General and congress acted favorably on the Pueblo's claim to the Gallegos Grant, and that the Gallegos-Miguel de la Vega y Coca deed was considered.

10. This opinion is partially based on the irrationality of such a large area being simply a surveying error, and on the excess area clearly being about one half of the area now claimed to be the Gallegos Grant. This would also explain why the Pueblo of Santo Domingo ultimately withdrew their application to the Gallegos Grant before the Court of Private Land Claims.

11. In my opinion the Pueblo of Santo Domingo's claim to the Gallegos grant has already been acted upon favorably by the Office of Surveyor General and Congress.

/s/ John O. Baxter

Subscribed to and sworn before me this the 18th day of April 1986.

Notary Public

My commission expires:
October 20, 1990

## APPENDIX C

EXCERPTS FROM
DEPOSITION OF Myra Ellen Jenkins
(Taken July 6, 1985)

Q. I see. Was there any indication of how Diego Gallegos was claiming this land that he was given half interest?

A. He claimed it by a grant.

Q. Was there a grant?

A. There is no record of such a grant, no.

Q. I see. So Diego Gallegos was given title to something he didn't own, apparently?

A. That document is highly suspect, for one thing. Miguel Thenorio de Alba was alcalde mayor of Taos and Picuris as the time this grant was supposed to have been made.

Q. And that is where it's supposed to have been made?

A. No. It appears in the archives, this purported conveyance, or I don't know its purport, but I think if he conveyed, it's something to which there is no record that he had any right.

Q. I see. What about these petitions for grants?

A. They were all disallowed.

Q. Okay. Did you find any historical records of Diego Gallegos' death?

A. I looked in the burial records,it should have been either in Santo Domingo or Cochiti, I think, and couldn't find a record of his death, but he had by 1748, when the widow conveys, but I couldn't find a record of his death, no.

Q. Okay. Did you find a record of his marriage?

A. No, I didn't. It's Maria Josefa Gutierrez. Some of the church records are also fragmentary, and I looked, but I didn't find. Now, I may not have looked earlier or late enough , wait a minute, yes, yes, yes, there is a record of his marriage, he marries her in Bernalillo, Maria Josefa Gutierrez.

Q. How did you track that down?

A. I accepted Fray Angelico Chavez' "Origins of New Mexico Families." He takes that material entirely from the church archives, but I did look for the death of Gallegos and couldn't find it.

Q. And he refers to Diego Gallegos in that book?

A. Yes, he does. He says a funny thing in it, of course, he is truncating his information that his wife and children later sold land to Santo Domingo, I think—you don't happen to have a copy, but it does make a very brief statement of the sale of land, I don't know that he said to Santo domingo. But he statement concerning her, but apparently he doesn't have the death—he didn't find the death of Gallegos, either, but he is dead by—

Q. Why would this Maria Josefa Gutierrez still maintain her, I assume, maiden name?

A. They always do, a Spanish woman, clear up until about the turn of the century, always carries her maiden name, she is buried under it, and so on. She didn't even add the "de" until after U.S. occupation, so always, that is one of the kind of confusing things sometimes, and yet, it's one of the very things by which you can trace genealogy, in many instances, is the fact that they always carry their maiden names.

Q. Doesn't she also assume the name of her husband?

A. No, she is buried under her own name, it would say 'Esposa de,' but she never takes her husband's name, women's lib, Spanish style.

Q. Did you find any other documents concerning Maria Josefa Gutierrez?

A. No, I didn't, and I couldn't find any record of her death, nor could I find who the children are in the baptismal entries.

Q. Now, are you an expert on Spanish law?

A. No, I am simply an amateur. No, as it is interpreted. I have no legal training.

Q. would you give an expert witness interpretation concerning Spanish law?

A. I would quote the law. If I had some knowledge as to where to find it interpreted, s (sic) to how the authorities interpreted it.

Q. I see. So your function was basically an archival search function?

A. An historian.

Q. Yes. Are you familiar with the various concepts of property law under the old Spanish—

A. What the concepts are, yes.

Q. Are you familiar with Las Siete Partidas?

A. Yes. Well, that is a law code of Alfonso, The Wise, yes.

Q. Are you familiar with the recopilacion?

A. Very, very.

Q. Okay. And the recopilacion de las Indias?

A. Recopilacion de las Reynos de las Indias, commonly known as the recoup, yes.

Q. That was a collection of Spanish laws concerning the new world?

A. Yes, that is the codification in 1680, yes.

Q. In there, they have a lot of provisions concerning land grants in the new world?

A. Yes, there is one whole book, as a matter of fact, on land, yes, and there is also one whole book on Indian law and Indian rights.

Q. Now, were there provisions on the—well, concerning Spanish land grants in New Mexico?

A. Not in recopilacion on the—well, concerning Spanish land grants in New Mexico?

Q. Well, to your understanding, did the recopilacion apply to New Mexico land grants?

A. Yes. Well, it applied. As I understand now, of coarse, you have that one section that I told you about, about the governor making the land grants, but certainly the whole system is outlined in the recopilacion concerning the making of grants in Mexico, and of making all kinds of grants. Now, the trouble is with New Mexico, and you get up to the frontier, things don't quite just fit the pattern, so of course, you have to adapt them so you don't find New Mexico land grants specifically fitting that pattern.

Q. In other words, some Spanish land grants do not comply with the provisions of the recopilacion?

A. It isn't a matter of they don't comply, as I interpret it, it's a matter that they just don't quite fit the mold. I mean, your know, the business of the four square league grant for Spanish towns, I am talking about, they don't fit that. If you are going to have a little settlement of like Las Trampas or any of the other little outlying settlements, they are extended communities along the strams, and they, of course, make use of every bit of irrigable land, so it isn't that they are not in compliance, it is that they are adapting, obviously, the laws, and then there is a new recopilacion in 1728. I think, but New Mexico does have a very different system, all right, than specifically following exactly what the recopilacion says.

Q. Have you ever found any indication in the recopilacion or in the novisimo recopilacion where the territory of New Mexico is exempted from the provision of those enactments?

A. No, no.

Q. Now, those laws concern the land grants, there were provisions in there about requirements to be met by grantees after obtaining the original grant?

A. Yes, uh-huh. Well, I am not sure what the recopilacion says specifically. I know how it was applied in New Mexico, the governor makes the grants and it goes by a regular system. There is the investigation of the petition which states that the land is realengo or it's baldios or whatever, and then to the governor, and then the governor sends the alcalde out to investigate, see if there is any third party involved or whatever, and then if everything seems to be in order and it is realengo, then the grantees are placed in possession, and then the final proceedings come back to the governor for approval.

Now, this is not always the case. In the early 1700's, essentially it is the case, basically after 1750, and then there is a provision in the private grants, by and large, in the final order of the governor, that the grantees must live on them four years before, yes, before selling or abandoning.

Now, they could sell before and they could not ask for land in anther place, normally farming land, that is, if they already had a grant, until they gave up the one grant.

Q. Have you found any documents concerning the Gallegos Grant, and whether or not these things were investigated?

A. Well, yes, it's in the grant papers, yes, it's in the approval in Exhibit Number 1, the procedure is quite clear, and it's the very normal, usual procedure.

Q. You had previously said that, in your opinion, this was a valid Spanish land grant, the Gallegos Grant?

A. Yes.

Q. And but yet, you indicated that you are not an expert on Spanish law. Are you saying that there is not question that something was given, that there was a grant known as the Gallegos Grant?

A. No, that is not what I am saying. I am saying that this is made in strict accord with the whole system of laying out a grant as it develops in New Mexico, and I don't know how many dozens of land grant cases follow the regular pattern.

Q. So it's a peculiar Spanish land grant in New Mexico?

A. Yes.

Q. As to its legality under Spanish law, you are assuming the expert witness position of saying that it is a legal, valid land grant in compliance with all Spanish law?

A. I am saying that it was accepted by the authorities as a legal grant.